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OFFICER J. EWART

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KATHRYN WADE, an individual

Plaintiff,

v.

CITY OF ANTIOCH, OFFICER M.
MELLONE, OFFICER J. EWART, and
DOES 1-10, inclusive,

Defendants.

Case No. 4:23-cv-01130-DMR

**DECLARATION OF JOHN ROBINSON IN
SUPPORT OF DEFENDANTS CITY OF
ANTIOCH, JACOB EWART AND MICHAEL
MELLONE'S MOTION TO DISMISS
PORTIONS OF PLAINTIFF'S THIRD
AMENDED COMPLAINT**

I, JOHN ROBINSON, declare as follows:

1. I am an attorney at law and duly licensed to practice before all courts of the State of California and before the United States District Court for the Northern District of California. I am an attorney with the firm of Castillo, Moriarty, Tran, & Robinson, attorneys of record for the City of Antioch and Michael Mellone.

2. I have personal knowledge of the following facts and could testify competently to them.

3. Attached as **Exhibit A** is a true and correct copy of the certified transcript our office received from the hearing on Defendants’ Motion to Dismiss portions of Plaintiff’s Second Amended Complaint, held on August 22, 2024.

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Donna M. Ryu, Magistrate Judge
4

5 KATHRYN WADE,) No. C 23-01130-DMR
6 Plaintiff,)
7 vs.)
8 ANTIOCH POLICE DEPARTMENT,)
9 et al.,)
10 Defendants.)

11
12 Oakland, California
13 Thursday, August 22, 2024

14 TRANSCRIPT OF THE OFFICIAL ELECTRONIC
SOUND RECORDING 1:03 - 1:26 = 23 MINUTES

15 APPEARANCES:

16 For Plaintiff:

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20 O'Melveny & Myers, LLP
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BY: ENOCH O. AJAYI, ESQ.

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23
24 (APPEARANCES CONTINUED ON NEXT PAGE)
25

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Transcribed by:

Echo Reporting, Inc.
Contracted Court Reporter/
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1 Thursday, August 22, 2024

1:03 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling Civil Case C-23-1130-DMR,
5 Kathryn Wade versus Antioch Police Department, et al.

6 Counsel, please state your appearances, starting with
7 the Plaintiff's attorneys first.

8 MR. AJAYI (via Zoom): Good afternoon, your Honor.
9 My name is Enoch Ajayi. I'm here with my colleague Jorge
10 deNeve. We represent Plaintiff Kathryn Wade.

11 THE COURT: Mr. Ajayi, Mr. deNeve, good afternoon.

12 MR. DENEVE (via Zoom): Good afternoon.

13 MR. ROBINSON (via Zoom): Good afternoon, your
14 Honor. John Robinson on behalf of the City of Antioch and
15 Lieutenant Michael Mellone.

16 THE COURT: Good afternoon, Mr. Robinson.

17 MR. WALLS (via Zoom): And Chester Walls for
18 Defendant Jacob Ewart, your Honor.

19 THE COURT: Mr. Walls, good afternoon.

20 Okay. We're on the -- here for the motion to dismiss
21 the operative complaint, which is the second amended
22 complaint. I'll be ruling from the bench today, by the way.

23 So, the first thing I want to do is sort of
24 administrative or by way of disclosure, I saw in your papers
25 that you pointed out that I was the settlement judge in one

1 -- in a -- in a prior case brought by Ms. Wade in -- I guess
2 there was an April 2014 incident for which she filed a
3 lawsuit or perhaps it was she and her son, and I -- I just
4 wanted to let you know that I -- I don't -- I mean, I have a
5 vague recollection that it happened. I pulled my file just
6 to make sure that it did happen. I don't recall anything
7 about the -- the facts of the case or -- or really the --
8 the settlement conference. I have done hundreds upon
9 hundreds of them since, but I wanted to make sure that I
10 disclosed it to you just in case anybody -- and, so, I have
11 no -- I don't see any reason why I need to recuse from the
12 case, but I wanted to make sure that I disclose it in case
13 anybody has questions or would like to -- is considering
14 making a motion based on that disclosure.

15 Mr. Robinson?

16 MR. ROBINSON: And, your Honor, I guess I'll start
17 because I -- I put it in the papers, and I did not put it in
18 there to suggest any of that. It was more just to kind of
19 emphasize that that case has been resolved and -- and put
20 all the cards on the table, but I -- my clients have no
21 intention of making any kind of motion to recuse or anything
22 like that, and I apologize if that was what I suggested.

23 THE COURT: No, no. I really appreciate -- I
24 think it's the -- the best practice to put it out there. I
25 wouldn't have known otherwise. It's good for everyone to

1 know. So, I appreciate that you did that.

2 Mr. Walls, your client have any concern or would
3 you like to consider filing a motion?

4 MR. WALLS: Not at this time, your Honor. The --
5 the pleading was really joined between Mr. Robinson and I.
6 So, it's not really new information particularly to --

7 THE COURT: Okay. And, Mr. Ajayi?

8 MR. AJAYI: No issue, your Honor.

9 THE COURT: Okay. Great.

10 Now, moving on to the motion to dismiss, first, we have
11 just some clarification around claims one and four. I think
12 we have now clarified that those claims for the Section 1983
13 claim based on the violation of Fourth Amendment for
14 unreasonable search and seizure and the Bane Act claim are
15 really just about the March 11th, 2021 allegedly unlawful
16 search and seizure at Ms. Wade's home.

17 Mr. Ajayi, could you please just confirm?

18 MR. AJAYI: Yes, your Honor. We confirm.

19 THE COURT: Yeah. Okay. Okay. So, we all know
20 that's what -- that's what it is, and the Defense has said
21 then if that's what it is, we don't have a -- a motion with
22 respect to those claims.

23 For claim two, it's brought under Section 181, but
24 under Yoshikawa, which is the 2023 en banc case for the
25 Ninth Circuit, it has to be pleaded as a 1983 case. So,

1 1981 provides the substantive right, but because we have
2 state actor Defendants, it needs to be repleaded as a 1983
3 claim. So, I'm going to grant the motion to dismiss but
4 with leave to amend so that you can reframe it as a 1983
5 claim based on a violation of 1981.

6 But I will say that it will be important in doing it.
7 You know, it's up to you how you want to frame it. You did
8 -- the second amended complaint has some broad allegations
9 about a pattern and practice, but I -- I think it will be
10 important to assert what exactly is the injury or where --
11 what -- what is it based on. And part of that is because
12 your complaint talks about incidents back to 2014. So,
13 there may be a problem with the statute of limitations, for
14 example. So, I ask that, just to avoid future pleadings
15 challenges, to make sure that when you're pleading it, it's
16 -- it's clear exactly what your client is seeking
17 compensation for, what events. Okay?

18 MR. AJAYI: Yes, your Honor.

19 THE COURT: Any questions about that?

20 MR. ROBINSON: Not from the Defense. I guess the
21 only -- well, I think I understand. I'll save it for the
22 end if it -- if it's not answered.

23 THE COURT: Yeah. I mean, they get to -- I'm not
24 going to tell them how to plead their claim.

25 MR. ROBINSON: Sure.

1 THE COURT: It's unusual to have a 1983 claim with
2 a -- based on a substantive violation of 1981. At least in
3 -- in my experience it's unusual. But it can be done. It's
4 just I'm not exactly sure how they're going to plead it, but
5 I can -- just in looking at it, I see some issues around
6 just what exactly are you basing it on, what is she going to
7 seek compensation for. For purposes of notice pleading, I
8 think it's important for the Defense to be able to
9 understand that, and the complaint actually reaches way
10 back. And -- and, so, if there's a theory that's scooping
11 all of that in, you need to explain that in the pleading.
12 If it's -- or if it's just some of that, then -- then make
13 that clear as well. Okay?

14 MR. AJAYI: Understood, your Honor.

15 THE COURT: All right. Great.

16 Now, as for the Monell claim, which is claim three, I'm
17 going to grant the motion in part with leave to amend. So,
18 as currently pleaded, I find that the second amended
19 complaint does adequately plead a Monell claim for municipal
20 liability with respect to the March 11th, 2021 Fourth
21 Amendment violation. Okay. There's an -- if that were the
22 only part of the Monell claim, they would have adequately
23 pleaded it, and Defense would -- I'm denying the motion with
24 respect to that part of the claim. But it appears to also
25 be based on this 1981 claim, and -- and for the reasons that

1 I just stated, I -- I don't -- I'm going to grant the motion
2 with leave to amend as to that because it's not clear what
3 it is the Plaintiff is challenging because it has to be the
4 -- the policies, the moving force behind something, behind
5 the constitutional violation. So, you need to explain what
6 that -- what that violation is more clearly.

7 So, I'm -- I'm granting the motion in part with respect
8 to Monell. Okay.

9 The final part of the motion is -- is about
10 bifurcation, bifurcation of -- of discovery on Monell versus
11 rest of the case. I do not do bifurcated discovery in -- in
12 these cases where there's Monell because it just draws the
13 -- you know, there's overlap, and it just draws the case out
14 too long, and I have never had a problem being able to
15 manage a case with a Monell claim with just discovery
16 proceeding alongside the -- the more -- the -- the non-
17 municipal liability claims. So, that part of the request is
18 denied.

19 So, that's my ruling. As you can see, I didn't need a
20 lot of argument. Your papers were very clear and helpful.
21 It's just me having to decide on the law, but do you have
22 any questions or concerns you want to raise.

23 Mr. Robinson?

24 MR. ROBINSON: Yes, your Honor. The only -- I
25 appreciate that, and -- and I think I understand the -- the

1 one thing I wanted to follow up on is the Monell claim is I
2 heard the Court to say, I'm allowing a Monell claim to
3 proceed as it relates to the March 11, 2021 incident.

4 THE COURT: They have adequately pleaded, you
5 know, with sufficient specificity about essentially all --
6 the -- the practices and I guess customs that led to --
7 they're saying led to the -- the March 11th incident. So, I
8 don't mean to put words in the Plaintiff's counsel's mouth
9 around this. So, Mr. Ajayi, please feel free to correct me,
10 but I think it -- you know, the basic story is Antioch's
11 history of policing and sort of allowing racist comments
12 between -- among officers going -- known to command and
13 allowing the proliferation, in their words, of a I guess
14 unequal police -- policing efforts that -- that singled out
15 African Americans, that that was the driving force behind
16 allowing this unlawful search to occur that day.

17 MR. ROBINSON: And I guess that's where I just
18 want to -- to follow up because I read their papers to say
19 the 1983 section of the Monell claim is for a widespread
20 custom of "entering Black residents' homes without warrants,
21 in violation of the U.S. Constitution," and I just want to
22 make sure that that specifically -- the Monell claim that
23 the Court is allowing is a widespread custom, because they
24 don't argue ratification. They don't argue an unlawful
25 policy. They're saying there's either a failure to train or

1 a widespread custom of, again, entering homes unlawfully.
2 That's -- that's the argument in their papers, and I just
3 want to make sure that's the Monell claim and not the 1981
4 claim which, as the Court's said, I -- I don't see that yet.
5 I'm going to allow them leave to amend, but that's based on
6 the racist or discriminatory conduct. The widespread custom
7 1983 claim is based on unlawfully entering homes, which is
8 what the -- the claim is about, right, the Fourth Amendment,
9 and the -- the Bane Act claim they've said is -- is narrowly
10 tailored to that March --

11 THE COURT: I think it's --

12 MR. ROBINSON: -- 11th, 2021 incident.

13 THE COURT: I think it's -- it's pleaded a little
14 more broadly than that, I mean.

15 But, Mr. Ajayi, why don't you state what exactly is the
16 Monell claim with respect to the Fourth Amendment issue?

17 MR. AJAYI: Absolutely, your Honor. It is pleaded
18 broadly, as you mentioned. Our Monell claim regarding the
19 Fourth Amendment issue was not only this widespread custom
20 of entering Black residents' home and searching it. It's,
21 generally speaking, the racist comments we allege and the
22 racist culture that permeated in the department led to the
23 violation or the difference in policing that led to the
24 Antioch Police Department officers being at the home that
25 day in the first place. So, it was this racist conduct. It

1 was this difference in policing that we believe led to the
2 violation of the right, not just that there was a specific
3 pattern of violating this Fourth Amendment right, but that
4 that violation never would have occurred if not for the
5 difference in policing that she suffered.

6 THE COURT: Okay. But are you also saying what
7 Mr. Robinson said, which is there's a sort of -- with
8 respect to entering people's homes, there was a -- a -- a
9 custom and practice that --

10 MR. AJAYI: Yes.

11 THE COURT: Okay. So, it -- it was what Mr.
12 Robinson said but more broadly, that the reason that
13 happened is because there was racist -- sort of racist
14 culture of policing in Antioch?

15 MR. AJAYI: Yes.

16 THE COURT: Okay. Mr. Robinson, that's how I
17 understood it, but do you have any questions?

18 MR. ROBINSON: Well, I don't have any questions.
19 I just want to -- you know, the initial part of the Court's
20 ruling as it relates to the 1981 claim, I read their Monell
21 claim to be in part 1983 and in part 1981.

22 THE COURT: Yes.

23 MR. ROBINSON: And the Court has said the 1981
24 isn't -- there's not enough there. I need you to replead
25 that. And -- and what I hear is the Monell claim is based

1 in part on what I narrowly -- tried to get narrowed down to,
2 which is unlawfully entering homes.

3 THE COURT: Well, they --

4 MR. ROBINSON: And there's a second --

5 THE COURT: No. I mean, those are not -- those
6 are not -- I don't see that they need to be broken apart. I
7 mean, as Mr. Ajayi explained, what the story will be --
8 let's say we took out the 1981 claim completely. The Monell
9 claim on the 1983 Fourth Amendment aspect is that because of
10 this culture of -- of, you know, racist policing -- I'm
11 going to shorthand it that way. It's spelled out more in --
12 in the complaint -- it led to a -- a, you know, uneven
13 enforcement, including things like what Ms. Wade experienced
14 on March 11th, 2021, which is an unlawful entry and search
15 and seizure because she's Black.

16 MR. ROBINSON: Understood. And then just the
17 last --

18 THE COURT: Mr. Ajayi, did I get that -- is that a
19 fair statement?

20 MR. AJAYI: Yes, your Honor.

21 THE COURT: Okay. Mr. Robinson?

22 MR. ROBINSON: The only follow up I would ask is,
23 as the Court's aware, there's different ways to prove
24 Monell, and what I hear --

25 THE COURT: Yes.

1 MR. ROBINSON: -- the Court to say is this is a
2 widespread custom theory because they didn't argue
3 ratification. They didn't argue an unlawful written policy,
4 and I'm just trying to streamline down the road with
5 discovery and the motion for summary judgment that -- that
6 those -- those theories are limited to a widespread custom
7 or practice or a failure to train. There's no ratification.
8 There's no unlawful written policy.

9 THE COURT: I -- I didn't see a ratification
10 theory pleaded. I'm not sure I saw training pleaded. I --
11 I did -- you know, custom, policy, practice are all kind of
12 part of the same -- the -- that is one of the theories
13 essentially. You can show it in different ways. It's not
14 necessarily a written policy, but custom and practice can
15 amount to a policy. That's how I understood their claim.

16 MR. ROBINSON: Agreed. I'm just trying to look
17 for -- because it can affect -- again, this is why we ask
18 for bifurcations. It can affect what is requested, mainly,
19 ratification. And -- and I know that claim can kind of open
20 the door, you know, to a lot of different discovery and then
21 a motion for summary judgment.

22 THE COURT: Mr. --

23 MR. ROBINSON: So, I'm just trying to --

24 THE COURT: -- Ajayi -- oh, sorry to -- sorry for
25 interrupting. Go ahead.

1 MR. ROBINSON: No. I -- you understand. I -- I
2 think I've made the point. I'm not trying to take more time
3 than -- than necessary. It's just I'm trying to limit it to
4 -- to what I saw that was pled.

5 THE COURT: I -- I think that's fair.

6 Mr. Ajayi. I did not see a ratification theory. Did
7 you mean to plead that?

8 MR. AJAYI: Your Honor, what we pled was that
9 there was a Monell claim, and, as you've mentioned, there
10 are different ways to plead that, and we have successfully
11 pled that generally. So, as we take discovery, it may be
12 true that there was ratification that we did not know about,
13 right.

14 THE COURT: Okay.

15 MR. AJAYI: So, that is a possibility that there
16 was an express policy that we did not know about. So, the
17 question now is only whether or not we've pleaded the Monell
18 claim.

19 THE COURT: Well, you're going to -- you know, we
20 are going to run into problem -- the reason why Mr. Robinson
21 is bringing this up, and it's a very good point, is that
22 he's trying to make sure he understands the scope of
23 discovery on Monell. It has to be tied back to a claim or
24 defense. And, while I understand Plaintiff wants to broadly
25 plead it so that he can have broad access to discovery,

1 you're going to run into a problem pretty quickly with me if
2 it turns into what looks like a fishing expedition. On the
3 other hand, I get you don't have all the answers right now.
4 You've pleaded a Monell claim. But if you start asking for
5 very broad ratification discovery without having something
6 to hang it on, then that's going to get shut down very
7 quickly.

8 So, that's -- that's why, you know, I'm not going to
9 shut it down now, but it's certainly not opening the door
10 wide. If there's something you find, you know, through a
11 discussion of, I don't know, 30(b)(6) or -- or something
12 else that opens it to either -- you know, to ratification
13 theory -- what about training theory? What would you say on
14 that?

15 MR. AJAYI: Yes. So, on the training theory, the
16 question is whether there was a deliberate indifference to
17 the constitutional violation.

18 So, here, if we're -- if, as we're alleging, what we're
19 finding is that numerous -- there are numerous examples of
20 searches and seizure of Black residents' homes and, as we
21 allege, there should have been or it's -- the City of
22 Antioch should have trained the officers to prevent those
23 constitutional violations, I believe we can make that claim,
24 your Honor.

25 THE COURT: Okay.

1 MR. AJAYI: And I don't think that we -- I don't
2 think that it has to be determined now that there's
3 absolutely no question as to whether there is a failure to
4 train or there's absolutely no question as to whether
5 there's ratification, because we -- we -- we can't
6 necessarily know what's within the Antioch Police Department
7 before we take discovery to find out.

8 THE COURT: Again, so, same point. I'm not going
9 to box you in. On the other hand, you're going to run into
10 some problems if you -- you know, if you're using it as what
11 looks like a fishing expedition, because Monell discovery
12 can be very extensive. So -- and it may be that Mr.
13 Robinson and Mr. Walls pushes you on another round because
14 I'm giving you leave to am end so that you can explain what
15 your 1981 theory of Monell is more clearly because it's not
16 there now. So, the -- the motion was granted as to that
17 aspect.

18 And I've written -- I mean, you can pull up cases that
19 I've -- I've written orders on about Monell and Monell
20 theories so that you can see how I've laid out the -- the
21 Ninth Circuit law on the various ways to get to municipal
22 liability. So, you know, it's not -- this is not going to
23 be -- please do not hear this as since I blessed part of the
24 claim, the discovery doors are wide open to anything you can
25 possibly hook to Monell. It won't go that way.

1 Certainly, the core of it is -- that you pleaded so far
2 is policy, you know, custom, practice. I'm not going to --
3 I'm not going to say anything more about ratification or
4 training at this point because we have another round of
5 briefing -- of -- of pleading to go. Okay. But, hopefully,
6 this has been -- has given you some idea of how I'm going to
7 look at it going forward. Okay?

8 MR. AJAYI: Thank you, your Honor.

9 MR. ROBINSON: Understood, your Honor. Thank you,
10 your Honor.

11 THE COURT: Okay. Any other questions about
12 Monell?

13 MR. ROBINSON: Nothing from the City as it relates
14 to Monell. I think I understand.

15 THE COURT: Okay. Any other questions about
16 anything else on today's motion?

17 MR. ROBINSON: Not from the City.

18 MR. AJAYI: Nothing from us, your Honor. Nothing
19 from the Plaintiff.

20 THE COURT: Okay. Mr. Walls, anything?

21 MR. WALLS: Nothing on the motion, your Honor. I
22 see, though, on our calendar, we have a status conference
23 coming up on September 4. I just to know if in light of the
24 Court's ruling, if we might push that out. And I -- I also
25 have a scheduling conflict. So, that's another reason for

1 asking for it.

2 THE COURT: Yeah. Yeah. I think that -- that
3 makes sense. So, let's get you a deadline for filing a
4 third amended complaint? Can we do that within a couple of
5 weeks? That would put you at September 5th. Does that
6 work?

7 MR. AJAYI: September 5th would be a little soon,
8 your Honor.

9 THE COURT: What date would you like?

10 MR. AJAYI: We could do September 12th, if that
11 works.

12 THE COURT: Any objection for September 12th, Mr.
13 Robinson?

14 MR. ROBINSON: No, your Honor.

15 THE COURT: Mr. Walls?

16 MR. WALLS: No, your Honor.

17 THE COURT: Okay. So, amended complaint is due by
18 September 12th. And then, let's see, your -- sorry. I'm
19 just trying to -- your next CMC's going to -- I'm going to
20 take -- vacate the September 4th and move you to October
21 30th at 1:30 by Zoom for your next CMC. Your updated joint
22 CMC papers will be due October 23rd. Okay. Does that work
23 for everybody?

24 MR. ROBINSON: Yes.

25 MR. AJAYI: Thank you, your Honor.

1 MR. WALLS: Yes.

2 THE COURT: Okay. Then I think we have a plan.

3 Is there anything else from anyone?

4 MR. ROBINSON: Not from me.

5 MR. AJAYI: Nothing from the Plaintiff.

6 THE COURT: Okay. Well, then I look forward to
7 seeing you in October for your CMC. Okay.

8 ALL: Thank you, your Honor.

9 (Proceedings adjourned at 1:26 p.m.)

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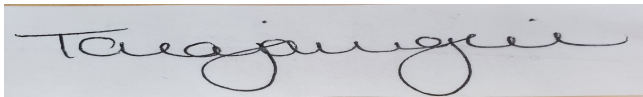
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A handwritten signature in cursive script, appearing to read "Tara Jungi", is displayed within a rectangular box.

Echo Reporting, Inc., Transcriber

Tuesday, September 3, 2024